DOCUMENT RESUME

ED 231 116 EC 151 991

AUTHOR	Grosenick, Judith; And Others
TITLE	Excerpts From: Disciplinary Exclusion of Seriously Emotionally Disturbed Children from Public Schools: Monograph 7. Monograph Series in Behavior Disorders.
INSTITUTION	Drake Univ., Des Moines, Iowa. Midwest Regional Resource Center.
SPONS AGENCY	Special Education Programs (ED/OSERS), Washington, DC.
PUB DATE	Mar 82
CONTRACT	300-80-0726
NOTE	45p.; For related documents, see EC 151 985-990.
PUB TYPE	Guides - Non-Classroom Use (055) -- Legal/Legislative/Regulatory Materials (090)
EDRS PRICE	MF01/PC02 Plus Postage.
DESCRIPTORS	*Behavior Disorders; Compliance (Legal); *Court Litigation; Disabilities; *Discipline Policy; Due Process; *Emotional Disturbances; Federal Legislation; *Public Education; Student Behavior
IDENTIFIERS	Education of the Handicapped Act 1970; Office of Civil Rights Guidelines; *Public Law 94 142; *Rehabilitation Act 1973 (Section 502)

ABSTRACT

Issues surrounding disciplinary exclusion of seriously emotionally disturbed children from public schools are addressed, along with applicable federal legislation, court cases, and Office of Civil Rights (OCR) opinions. Exclusion is defined as the removal from, or the prohibition of, participating in the public school program in part or entirety, including suspension and explusion. Two overlapping pieces of federal legislation and their regulations are reviewed: Education of the Handicapped Act, as amended by P.L. 94-142, and Section 504 of P.L. 93-112, the Rehabilitation Act of 1973. The following issues are examined: (1) What is the relationship of a child's behavior to his/her identification as being handicapped, particularly for the seriously emotionally disturbed? (2) Are there limits to a school's responsibility to provide a free appropriate public education to a handicapped child? (3) How should disciplinary matters related to handicapped children be decided? (4) What procedural safeguards are required if a school elects exclusion as an alternative? Court cases and OCR opinions are discussed that pertain to the concepts of the least restrictive environment for the child, the right to a free appropriate public education (FAPE), and due process. Based on directions suggested by the courts and OCR for school districts, it is concluded that any permanent exclusion of a handicapped student probably violates the FAPE requirement. Ten annotations of court cases are appended. (SEW)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☑ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

ED231116

MONOGRAPH SERIES in BEHAVIOR DISORDERS

Monograph 7:

Disciplinary Exclusion ...

EDI5991

Midwest Regional Resource Center
Drake University
Des Moines, Iowa

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
Raymond L Fellows
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

This project has been funded at least in part with Federal funds from the U. S. Department of Education, Special Education Programs Division, under contract number 300-800-726. The contents of this publication do not necessarily reflect the views or policies of the Department of Education, nor does mention of trade names, commercial products or organizations imply endorsement by the U. S. Government

May, 1982

Monograph 7:

EXCERPTS FROM:

Disciplinary Exclusion of Seriously Emotionally Disturbed Children from Public Schools

Judith Grosenick, Sharon Huntze,
Beverly Kochan, Reece Peterson,
C. Stuart Robertshaw, and Frank Wood

Edited and Disseminated by
Midwest Regional Resource Center
Drake University
Des Moines, Iowa

March, 1982

4

This monograph is designed to provide teachers and administrators with information on behaviorally disordered students. It is one of a series of seven. The other monographs in the series are:

1. Myths of Behavioral Disorders
2. Developing a School Program for Behaviorally Disordered Students
3. Establishing a Program for Behaviorally Disordered Students: Alternatives to Consider, Components to Include and Strategies for Building Support
4. Reintegrating Behaviorally Disordered Students Into General Education Classrooms
5. Positive Approaches to Behavior Management
6. Practical Approaches for Documenting Behavioral Progress of Behaviorally Disordered Students
7. Excerpts from: Disciplinary Exclusion of Seriously Emotionally Disturbed Children from Public Schools

Table of Contents

	Page
Introduction	1
Applicable Federal Legislation	5
Issues Surrounding Disciplinary Exclusion	8
Summary	21
References	24
Appendix - Annotated Court Cases	25

DISCIPLINARY EXCLUSION OF SERIOUSLY EMOTIONALLY DISTURBED CHILDREN FROM PUBLIC SCHOOLS

Judith Grosenick, Sharon Huntze, Beferly Kochan,
Reece Peterson, C. Stuart Robertshaw, and Frank Wood
Produced as part of the Project, National Needs Analysis in Behavior Disorders, Department of Special Education, University of Missouri, Columbia

Introduction

Background

The passage of federal legislation relating to the education of handicapped children has caused educators to scrutinize a variety of common educational practices in order to insure that they are compatible with requirements of the legislation. One such practice is the disciplinary exclusion of students from educational programs. Although disciplinary exclusion of student is not addressed *per se* in federal mandates, it is particularly important because it does confront two of the key guarantees contained in the legislation, that of a *free appropriate education* in the *least restrictive environment* for handicapped children. Thus, it represents an area of potentially conflicting policies and actions which has not yet been clearly addressed by the Office of Special Education (OSE) in its policy decisions and interpretations.

Disciplinary exclusion of students has long been a practice and concern of public schools, and it is likely to continue to surface frequently in public school environments. Discipline and behavior management in general are consistently identified as high priority concerns of both educators and the public that supports education (Gallup, 1981; Grosenick and Huntze, 1980). Certainly, disciplinary exclusion of students appears to be a standard practice of nearly all school systems, although individual procedures vary considerably from district to district. The concern for maintaining discipline in school environments is

particularly problematic when it involves youngsters who are or could be identified as seriously emotionally disturbed. Traditionally, many of these students have been excluded from school programs, a fact which was one of the provocations for federal legislation in the first place (Regal, Elliot, Grossman and Morse, 1972). While federal policy makers have been reluctant to interfere with schools' flexibility to deal with discipline issues (and ironically, to some extent, because they have been reluctant), the courts and the Office of Civil Rights (OCR) are becoming more involved in the issue. At present, a tremendous need for clarification of policy issues surrounding the disciplinary exclusion of handicapped (particularly seriously emotionally disturbed) students exists.

Purpose

The purpose of this paper is to explore and clarify issues surrounding the practice of disciplinary exclusion of seriously emotionally disturbed students. There is no doubt that issues surrounding this practice are of prime importance to policy makers at the local level, to state level persons who supervise local compliance with Federal law, and to college and university faculty who train teachers concerning their responsibilities to emotionally disturbed students. Thus, it is appropriate that professionals in the field turn their attention to examination of the practice in a systematic fashion. Clarification of these issues should address several aspects including: 1) delineation of relevant legislation; 2) synopsis of the most critical issues; 3) review of court cases, OCR, OSE and State Education Agency (SEA) findings which

speak to those critical issues; and 4) suggestion of policies and/or guidelines for local policies and decision-making based on current judicial and administrative thinking. This paper focuses on the first three aspects. However, relative to step three, only court and OCR decisions will be explored. This delimitation occurs for two reasons. First, both the courts and OCR have investigated and made decisions concerning this topic to a greater extent than have SEAs or OSE. Second, given the lack of OSE direction and the conflicting nature of SEA decisions that do exist, more consistent opinions that are likely to set precedent for all states can be found in court and OCR decisions. Review of the three aspects - legislation, critical issues and court cases - constitute a brief "state of the art" on the topic and will, hopefully, establish a base from which others may pursue the critical fourth aspect - policy and guideline recommendations.

Definitions

Exclusion refers to the removal from or the prohibition of participating in the public school program in part or entirety. A substantial body of policy and litigation exists which relates to exclusion based on such issues as health and immunization of students, educability and academic admission criteria for students and existence of handicapping conditions. While some of the judicial and administrative decisions relative to these different causes for exclusion may be predicated upon principles similar to those used for decisions on disciplinary exclusion, this paper focuses only on disciplinary exclusion, i.e., exclusion resulting from the student's behavior and designed to protect the "decorum" and

"educational environment" appropriate to a public school. As will be seen later, particular attention should be paid to the environment from which a student is excluded, i.e., exclusion from what placement.

There are two broad types of disciplinary exclusion - suspension and expulsion. As developed through recent practice, suspension usually refers to a temporary (ten days or less) exclusion of student, typically as a result of a crisis or emergency situation. Expulsion, on the other hand, usually refers to the more permanent exclusion of a student from a particular program or placement typically as a result (consequence or punishment) of behavior which was viewed as being severely disruptive of the school program or posing a threat to the physical or emotional well being of faculty and other students.

Three factors differentiate these two types of exclusion. As noted above, time is one differentiating factor. Suspension is a temporary measure, usually of a three to ten day duration. Expulsion is for a longer period of time, i.e., for the remainder of a school year (although sometimes all future involvement is prohibited). A second differentiating factor involves the nature of the exclusion, i.e., emergency vs. non-emergency. This distinction is dealt with in greater detail in a later section of the paper. The third differentiating factor focuses upon due process requirements. The due process procedures associated with expulsion are more stringent than those required for suspension. Due process prior to expulsion has a long and clear case law history. It is accurate to say that no student (handicapped or not) may be permanently excluded (expelled) from educational participation without an opportunity for a formal evidentiary hearing. Suspension, as opposed to expulsion, requires minimal due process, which most typically

involves: oral or written notice of the charges against the student; an explanation of the evidence the school authorities have; and an opportunity for the student to present his/her side of the story (Goss v. Lopez, 419 U.S. 565, 1975). Such minimal due process procedures most typically do not include a formal evidentiary hearing.

Applicable Federal Legislation

Prior to pinpointing specific issues related to the disciplinary exclusion of seriously emotionally disturbed students, it is first necessary to identify relevant legislation and regulations which impinge on this issue. Two overlapping pieces of federal legislation and their accompanying regulations are pertinent: Education of the Handicapped Act as amended by Public Law 94-142 (referred to hereafter at P.L. 94-142 or Education of the Handicapped Act), Section 504 of Public Law 93-112, the Rehabilitation Act of 1973 (referred to hereafter as Section 504). It is helpful to examine these laws and regulations in detail in order to become familiar with those sections and discussions upon which the courts and OCR base their decisions and findings.

Public Law 94-142 and Implementing Regulations

The right to a free appropriate public education (FAPE) in the least restrictive environment (LRE) is specifically guaranteed to all handicapped children by P.L. 94-142. Because disciplinary exclusion can violate these guarantees, they are often the legal basis of court cases relative to disciplinary exclusion. Because these rights, as well as 14th Amendment rights, can be violated, and because exclusion constitutes

a change of placement (this will be discussed at a later time), any movement toward such exclusion requires adequate procedural safeguards (due process). The law speaks very clearly concerning the appropriate due process that is to be accorded to handicapped individuals. Further, any student who has been referred for evaluation and/or has an appeal pending is accorded these procedural safeguards until a determination is made regarding the evaluation or appeal. Thus, P.L. 94-142 provides five relevant statutes to examine in relation to disciplinary exclusion - free appropriate public education, least restrictive environment, due process, change of placement, and child placement during proceedings.

Section 504

The potential denial of rights associated with disciplinary exclusion is couched in the broad language of Section 504.

Law: 794. Nondiscrimination under Federal grants and programs

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

While Section 504 is itself much less detailed than P.L. 94-142, it provides, through its implementing regulations, the same essential guarantees found in P.L. 94-142.

Beyond the portions of P.L. 94-142 and Section 504 mentioned, there are no other federal statutes which relate to the topic of this paper with the possible exception of the FAPE requirements of P.L. 89-313 (State Operated Programs for Handicapped Children). However, since it

has seldom served as the legal basis for court decisions, it has not been included. No federal statute specifically mentions disciplinary exclusion or addresses this practice directly. Specific references to disciplinary exclusion do occur in many state and local statutes and regulations. It is, of course, impossible to summarize these disparate statutes and regulations here. State and local policies restate, in various ways, the federal policies related to FAPE, LRE and Procedural Safeguards discussed earlier and, in some cases, they provide even more detail on how these policies will be applied within a particular jurisdiction. When conflict arises between state or local policy and the federal law, federal law is supreme (Grosenick, Huntze, Kochan, Peterson, Robertshaw and Wood, 1981).

Any overall consistency in state and local school disciplinary policy may be the result of several court actions on constitutional issues of "equal protection" (e.g., Brown v. Board of Education, 347 U.S. 483, 1954), "freedom of expression" (e.g., Tinker v. Des Moines, 393 U.S. 503, 1969), and "due process" (e.g. Goss v. Lopez, 419 U.S. 565, 1975) brought by students in the 1950s and 1960s. Supreme Court decisions in these cases: a) recognized the importance of a person's right to education, b) prohibited arbitrary or capricious removal of access to education, and c) required procedural safeguards in the attempt to achieve fairness in decision making about an individual's access to education. Many states and local school districts attempted to make their disciplinary policies conform to the general guidelines laid down in these decisions. However, these efforts have not proved sufficient to meet the stringent requirements that are set forth by the FAPE, LRE and Procedural Safeguards sections of P.L. 94-142 and Section 504.

Issues Surrounding Disciplinary Exclusion

Overview

Given the present status of law and policy related to the rights to education of handicapped children and the disciplinary exclusion of children from school programs, several questions (issues) emerge which suggest areas of potential conflict in policy or which will require clarification in order to guide school personnel in the development of appropriate discipline policies. These questions include:

1. What is the relationship of a child's behavior to his/her identification as being handicapped, particularly if a child is identified as being seriously emotionally disturbed? Is all of a child's behavior necessarily associated with his/her handicap? Is behavior requiring disciplinary action in and of itself an automatic cause for referral for identification as being emotionally disturbed? For example, if a child identified as being seriously emotionally disturbed assaults a teacher, what are the circumstances, if any, in which that behavior might be unrelated to his/her handicap? If the student was not identified as being seriously emotionally disturbed, would the assault constitute a basis for a referral for such a classification?

2. Are there limits to a school's responsibility to provide a free appropriate public education to a handicapped child? What are the restrictions on a school's disciplinary flexibility in dealing with handicapped children? For example, can seriously emotionally disturbed children be expelled? If so, under what circumstances? If not, what options short of expulsion are available?

3. How should disciplinary matters related to handicapped children be decided? Who can make such decisions? Are special procedures required because of a student's handicapping condition? If so, what are they? Are due process requirements identical for handicapped and non-handicapped children in such matters?

4. What procedural safeguards are required if a school elects exclusion as an alternative?

These are difficult questions. The statutes pertaining to handicapped children do not speak directly to the practice of disciplinary exclusion. Instead, questions concerning the issues that surround the practice are included in several sections of the statutes and regulations of both P.L. 94-142 and Section 504. These sections do not necessarily speak from the same perspective and in some cases appear to be in conflict. Further, state and local laws and policies which are specific to disciplinary exclusion may be at odds with some interpretations of various federal statutes. For example, federal statute does not make FAPE contingent upon acceptable school behavior, yet it is possible that a handicapped child's behavior would engage disciplinary policies which require expulsion of students exhibiting that behavior. How can educators resolve these kinds of conflicts?

Judicial and Administrative Influences

Judicial decisions and OCR findings are beginning to provide a precedent that should serve to guide future actions of school districts relative to disciplinary exclusion of seriously emotionally disturbed students. Many of the above questions have been asked of and addressed

by the courts and OCR. Review of those decisions and findings will provide a sense of direction relative to these difficult questions. The organization of this section, and much of its content, is credited to the National Center for Law and Education, Inc. Credit is, of course, given for quotations; however, special mention and thanks are in order for the complete and clear research they have done on this topic. The first part of the discussion will center upon the legislation and litigation that forms an overall framework for understanding the disciplinary exclusion issue as it relates to emotionally disturbed students. The second part will return to the previously posed informal questions and respond to those based upon the framework set forth. The Appendix contains an annotated description of the court cases discussed.

The National Center for Law and Education, in December, 1980, succinctly stated:

> The federal laws safeguarding the rights of students with special needs have implications for disciplining students identified as handicapped, those with evaluations or appeals pending, and students who may be perceived as handicapped, and, in particular, the circumstances under which they can be excluded through disciplinary suspension or other exclusion.
>
> Suspension and expulsion of handicapped students may be illegal under P.L. 94-142, as well as Section 504 of the Rehabilitation Act of 1973, and may be illegal for students referred for evaluation or perceived to be handicapped on one of the following grounds:
>
> 1) The right to a free appropriate public education which includes specially designed instruction to meet the student's individual needs.
>
> 2) The right to have any change in placement occur only through the prescribed procedures.
>
> 3) The right to an education in the least restrictive environment with maximum possible interaction with non-handicapped peers.

4) The right to continuation of the current educational placement during the pendency of any hearing or appeal, or during any proceeding relating to the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education.

5) The right not to be excluded from, denied benefits, aids, or services, or be discriminated against on the basis of one's actual or perceived handicapped status.

For students who have never been classified as handicapped or referred to evaluation:

6) The right not to be excluded from, denied benefits, aids, or services, or be discriminated against on the basis of one's actual or perceived handicapped status.

While FAPE, LRE and Due Process are specifically required in P.L. 94-142, one must look to the implementing regulations of Section 504 to see those concepts discussed specifically (see previous section of this paper). This is important to remember, since a ruling by OCR found that a district was in violation of Section 504 by denying FAPE (or LRE or Due Process), a finding readily apparent simply by looking at the statute itself. Decisions based on each of these grounds will be examined.

1. FAPE - Free Appropriate Public Education. FAPE has been a central issue in many court cases and OCR complaints. With only few exceptions (Stanley v. School Admin. Unit No 40, 1980), the courts and OCR have found that exclusion, expulsion, constructive exclusion, and non-emergency suspension violate a handicapped child's right to FAPE. Stuart v. Nappi, 1978, a case heard in U.S. District Court, has proved a persuasive decision, both in regard to FAPE and concerning the other grounds previously listed. Both the decision and the reasoning of that court have been deferred to in numerous ensuing cases. In Stuart v. Nappi, the court found that handicapped students (in this case a

learning disabled student with concomitant behavioral problems) would be deprived of FAPE by any non-emergency exclusion from her current placement.

The Stuart v. Nappi case brings two additional points to light. Since non-handicapped students can be excluded (with appropriate due process), must the inappropriate student benavior be related to the handicapping condition in order for FAPE to be violated by that exclusion? Secondly, if only non-emergency exclusion violates FAPE, what constitutes emergency exclusion and how may it be effected upon handicapped students?

As to the first point, there is less than unanimity on the subject. Stuart v. Nappi states that "any non-emergency exclusion, regardless of whether it was for behavior related to the handicapping condition, would deprive a handicapped student" of FAPE (National Center for Law and Education, 1978). (Emphasis added.) This reasoning is in contradiction to reasoning used in other cases (S-1 v. Turlington, 1981; Howard v. Friendswood Independent School District, 1978; Doe v. Koger, 1979). These cases seem to suggest that if the behavior of the student was not related to his/her handicap, then the student could be excluded under the same procedures used for non-handicapped students. Interestingly, however, in only one (Stanley v. School Admin. Unit No. 40) of the thirty of more decisions examined did the court find that the behavior in question was not related to the handicap. That one case may have been anomalous since little of the criteria used to establish this type of conclusion was included in any of the other cases. Apparently, it is quite difficult to prove that a child's disruptive behavior is not associated with a handicap, and a presumption that it is, generally

holds. If this is the case for other handicaps, it would appear to be virtually impossible to make this separation for a seriously emotionally disturbed student.

Regarding the second point, what constitutes emergency exclusion, Stuart v. Nappi again reasoned persuasively. The reasoning quotes a comment to 45, C.F.R. 300.513, which states:

> "While the placement may not be changed, this does not preclude a school from using its normal procedures for dealing with children who are endangering themselves or others."

It then goes on to say:

> This somewhat cryptic statement suggests that subsection 1415(e)(3) prohibits disciplinary measures which have the effect of changing a child's placement, while permitting the type of procedures necessary for dealing with a student who appears to be dangerous. This interpretation is supported by a comment-to-the-comment which states that the comment was added to make it clear that schools are permitted to use their regular procedures for dealing with emergencies.

So, although handicapped students cannot be denied FAPE by non-emergency exclusion, emergency exclusion procedures are available and make it clear that:

> "Handicapped children are neither immune from a school's disciplinary process nor are they entitled to participate in programs when their behavior impairs the education of other children in the program." (Stuart v. Nappi)

Thus, it appears established emergency exclusion of handicapped students is permitted so long as due process is followed. More specific guidelines were established in Mattie T. v. Holladay, 1977. Emergency conditions exist when:

> the child's behavior represents an immediate physical danger to him/herself or others or constitutes a clear emergency within the school such that removal from school is essential. Such removal shall be for no more than three days and shall trigger a formal comprehensive review of the child's IEP. If

there is disagreement as to the appropriate placement of the child, the child's parents shall be notified in writing of their right to a SPED (Special Education) impartial due process hearing. Serial three day removals from SPED are prohibited.

In summary, there appears to be current judicial opinion suggesting: 1) that any non-emergency exclusion of handicapped students violates FAPE; 2) that it is difficult and/or unnecessary to determine if the behavior is related to the handicap (if a child is handicapped, then number 1 applies, regardless of the relationship between the behavior and the handicap); and 3) emergency exclusion of handicapped students is permitted under stringent conditions.

A review of OCR opinions on this topic can be confusing in light of the previous discussion. Often, OCR cites that districts are in violation of Section 504 FAPE regulations for excluding a handicapped student prior to determination by the district as to whether or not the behavior was related to the handicap (Seattle School (WA) District No. 1; Corinth Municipal Separate School District; Lower Snoqualmie Valley School District No. 407; Community (IL) Unit School District No. 300; and Fayette (MO) R-III School District). OCR reasoning is based upon the premise that any reaction (i.e., exclusion) to a student's behavior is in violation of Section 504 only if that behavior is part of a handicapping condition, in which case discrimination based upon a handicapping condition is present. Whether or not this distinction is semantically or factually different from some judicial decisions is probably a moot issue in that OCR has not, in the seventeen complaints reviewed, encountered a circumstance in which the behavior was determined <u>not</u> to be related to the handicap. As mentioned previously, it is apparently quite difficult to prove such a dichotomy. In all

complaints on the issue, OCR found FAPE to have been violated under Section 504 if non-emergency exclusion was utilized.

2. Change of Placement. Very specific procedural safeguards are accorded handicapped children in a variety of situations, and change of placement is delineated as one of those situations. Courts have consistently reasoned that disciplinary exclusion constitutes a change of placement (Blue v. New Haven, 1981; S-1 v. Turlington, 1981; Stuart v. Nappi, 1978; Sherry v. New York State, 1979).

Consequently, several procedural safeguards apply: 1) parents must receive prior written notice of the change (there are content requirements for that notice); 2) an appropriately constituted IEP committee must re-evaluate the student's IEP (there are specific requirements for this process); and 3) although schools are not required to obtain parental permission prior to change of placement, if parents object to the change, then an opportunity for a due process hearing is required. These safeguards are in addition to the due process procedures required by any suspension or expulsion. Thus, if districts have excluded a handicapped student without following the previously cited safeguards, they have violated that student's legislative rights.

The National Center for Law and Education writes:

> the court (Stuart v. Nappi) rules that the "expulsion of handicapped children...is consistent with the procedures established by the Handicapped Act for changing the placement of disruptive children" (443 F. Supp. at 1243). As noted above, the Act does not preclude school authorities from dealing with emergency situations by suspending handicapped students (443 F. Supp. at 1242-43).
>
> While reiterating this principle as originally set forth in Stuart, the Court of Appeals in S-1 stated that an "expulsion is still a proper disciplinary tool under

(P.L. 94-142) and Section 504 when the proper procedures are utilized and under the proper circumstances" (635 F. 2nd at 348). The court emphasized that educational services must continue to be provided during the expulsion period.

The ambiguity between the court's findings that expulsion is a proper disciplinary tool and that educational services must continue to be provided during the expulsion period can be clarified. Expulsion, as the term is used by the court, can be defined as an exclusion of a handicapped student from his/her current (emphasis added) educational placement. This definition is consistent with the court's ruling that an expulsion constitute a change in educational placement triggering the procedural protections of P.L. 94-142. Any attempt by school districts to argue that the court's ruling requires their providing only homebound tutoring should be susceptible to challenge. In most instances, school districts will be unable to show that the student is being provided an appropriate education in the "least restrictive environment" as required under the change in placement procedures.

These decisions would seem to indicate that, except in emergency situations, exclusion from services is a violation of a handicapped student's rights. In the event that ongoing emergency exclusion has occurred, other services should be provided and procedural safeguards must be followed.

It should also be noted that, though a child may be excluded under emergency conditions, that too constitutes a change of placement if it exceeds three days, and thus change of placement safeguards must be provided in addition to the usual due process requirements. Therefore, emergency exclusion is not a means by which a district can initially exclude a child, and then ignore procedural safeguards, since emergency suspension cannot be extended or made permanent, but must lead to re-evaluation and placement.

OCR has also found districts in violation of required due process relative to exclusion defined as a change of placement (Seattle (WA) School District No. 1; Community (IL) Unit School District No. 300).

3. LRE - Least Restrictive Environment. Education in the least restrictive environment is one of the most critical guarantees of P.L. 94-142 and Section 504. This guarantee precludes restrictive placement based on categories of handicapping conditions and mandates placement based upon individual need. Stated positively, students are to remain with non-handicapped peers to the greatest extent possible. Both Stuart v. Nappi and Friendswood (also a U.S. District Court decision) utilized LRE as a basis for refusing districts the option of exclusion. Again, we can turn to the text of the Stuart case for clarification:

> An expulsion has the effect not only of changing a student's placement, but also of restricting the availability of alternative placements. For example, plaintiff's expulsion may well exclude her from a placement that is appropriate for her academic and social development. This result flies in the face of the explicit mandate of the Handicapped Act which requires that all placement decisions be made in conformity with a child's right to an education in the least restrictive environment (Id. 443 F. Supp. at 1242-43).

In the cases reviewed, OCR did not use LRE as a basis for determining violations of Section 504 due to disciplinary exclusion. This is not to say that it might not have been possible, simply that OCR was presented with complaints concerning disciplinary exclusion that were couched in terms of denial of FAPE or due process.

4. Continuation of Current Placement. The right to continuation of the current placement during certain proceedings is guaranteed under P.L. 94-142. Those "certain proceedings" include "provisions concerning any proposal to initiate or change or refusal to initiate or change the identification, evaluation or placement of the child or the provision of FAPE" (National Center for Law and Education). Two critical points follow here. The first is explicit; since expulsion is a change of placement,

any challenge to that "placement" will invoke procedural safeguards which require that the student remain in his/her current placement unless emergency suspension has occurred (Howard v. Friendswood; Stuart v. Nappi). In that case, emergency suspension does not constitute a change of placement unless suspension is for more than ten cumulative days (National Center for Law and Education). The second point is that this safeguard applies to students who have been referred for evaluation even though they have not been identified as handicapped. This prohibits districts from excluding a student who might reasonably be expected to be handicapped and, therefore, entitled to the rights under P.L. 94-142. The reasoning for all the above is clearly stated in S-1 v. Turlington (heard in U.S. District Court): "disciplinary proceedings do not supercede the rights of handicapped children under the Handicapped Act."

5/6. FAPE - LRE - Due Process. As previously indicated, OCR investigations of Section 504 violations and court decisions based upon Section 504 (as well as P.L. 94-142) generally look to the requirements of FAPE, LRE, and due process in determining if Section 504 has been violated. If these three requirements, as set forth in Section 504 regulations, have been violated, then discrimination based upon a handicap is determined. These three requirements and OCR/judicial findings have already been presented.

Discussion

With that background, let us turn to the questions posed earlier.

1. What is the relationship of a child's behavior to his/her identification as being handicapped, particularly if a child is identified as being seriously emotionally disturbed?

Although some court decisions and OCR rulings have indicated that a behavior must be related to the handicap in order for a handicapped student to receive "special" disciplinary considerations, there are two reasons why there does not appear to be a need to pursue this line of thought: a) even among court decisions and OCR rulings that maintain this reasoning, only one of thirty court cases and none of seventeen OCR findings reviewed were able to make a distinction between the disruptive behavior and the child's handicapping condition; and b) Stuart v. Nappi argues persuasively that the issue is irrelevant since a handicapped student cannot, under any circumstances, be denied FAPE, and exclusion does just that.

There is no body of judicial or administrative decisions to suggest that any behavior which warrants disciplinary action should also require a referral for evaluation as a possible handicapping condition. However, if referral for evaluation has occurred prior to the behavior event, then procedural safeguards accorded handicapped students are extended to the referred student. Some courts have not held this opinion (Mrs. A. J. v. Special School District No. 1), but it appears that the movement is in favor of extending these safeguards to referred students.

2. Are there limits to a school's responsibility to provide a free appropriate public education to a handicapped child?

A school may never deny FAPE to a handicapped student. The school's flexibility lies in: a) emergency suspension followed by processes to assure FAPE; b) re-evaluation of IEPs prior to exclusion (as due process requires) and the opportunity to determine if another placement is more suitable for a student; and c) provision of appropriate services during an exclusion from current placement.

3. How should disciplinary matters related to handicapped children be decided?

Due process requirements are not identical for handicapped and non-handicapped. P.L. 94-142 and Section 504 accord additional due process rights to handicapped students. Disciplinary matters should be decided in evaluation or re-evaluation staffings which occur because of the need to consider a change of placement.

The key decision makers in these kinds of disciplinary matters appear to be the appropriately constituted IEP committee members, as defined by relevant P.L. 94-142 regulations at federal state, and local levels. This committee is vested with what appears to be the critical decision in these cases - the appropriateness of placement. The appropriateness issue also hinges on the content of the IEP since it is in the specific goals and objectives listed that effectiveness of the IEP must be evaluated. Most of the judicial and OCR decisions examined referred the ultimate decision about appropriate placement back to the IEP committee. It should be noted that precedent has been set which indicates that school boards, who have traditionally exercised final decision making on school exclusion, are not the appropriate decision makers for handicapped students (S-1 v. Turlington). The rationale is that school board officials lack the necessary expertise to determine appropriateness of placement for handicapped students.

As of this writing, exclusion, with the exception of temporary suspension of no more than ten to fifteen days cumulative per school year (P-1 v. Shedd consent decree), is universally considered to be a change of placement for handicapped children triggering P.L. 94-142 and Section 504 protection. Serial suspension is frowned upon (Mattie v. Holladay)

since the intent of suspension is to deal with emergencies, and the use of serial suspension does no appear consistent with this intent. The inclusion of expulsion or other disciplinary procedures as part of a student's IEP is deemed permissible so long as the IEP is individualized to meet specific individual needs and is not a vehicle for circumventing the FAPE protection of federal law. Both suspension and expulsion are generally considered to be proper disciplinary tools under P.L. 94-142 and Section 504 so long as: 1) they are appropriately included in a student's IEP; 2) procedural requirements of P.L. 94-142 and Section 504 are followed; and 3) suspension does not result in a complete and permanent cessation of provision of education services (S-1 v. Turlington).

4. What procedural safeguards are required if a school elects exclusion as an alternative?

The procedural safeguards outlined in P.L. 94-142 and Section 504 are required either prior to or concomitant with any form of exclusion.

Summary

Barring decisions or rulings by the courts or OCR which depart radically from current positions, past decisions by OCR and the courts can be synthesized to produce a broad framework and some concrete directions for local districts to use as they face disciplinary issues involving handicapped students. These directions indicate to school districts that 1) it is probable that any permanent exclusion of a handicapped student violates the FAPE requirement, and 2) the procedural safeguards outlined in previous case law, which affect all students, in P.L. 94-142, and in Section 504 must be applied to handicapped students in all cases where any type of exclusion, emergency or otherwise, is

contemplated. These two directions, used as guiding principles, will go a long way toward assuring the guaranteed rights of handicapped students.

If local school systems were to revise their overall disciplinary policies in such a way as to take into account the thrust of the decisions described and analyzed in this paper, they may avoid potential conflict and litigation as well as the need to establish dual disciplinary systems, i.e., one for the handicapped and one for the non-handicapped.

Issues Not Yet Addressed

Several issues exist which have either not been addressed, or have not been addressed sufficiently to yield interpretation. These will likely continue to be clarified in upcoming decisions. The fact that Section 504 specifically includes alcoholism and chemical dependency as handicapping conditions (and its general broad inclusiveness of definition of handicaps) is something which has not yet received attention relative to discipline. Yet, these behaviors are often the very ones which specifically involve disciplinary action. Another controversial area will be criteria used to establish "appropriate" placement in the least restrictive environment given the propensity of a child to behave in ways likely to have disciplinary consequences, and whether IEPs could/should routinely include disciplinary procedures. This area is squarely the responsibility of the IEP committee and, thus, might best be resolved through professional rather than judicial means. Judges will likely be hesitant to become involved in issues of these types, although a lack of professional attention could provoke judicial intervention. An extremely difficult question which has surfaced in some court findings,

and may become increasingly prominent, is that of whether or not exclusion was due to inappropriate behavior resulting from an inappropriate placement. If so, how does this fact affect decisions concerning the exclusion and liabilities resulting from the exclusion. Yet another question which has not been addressed is the manner in which the "rules" that govern disciplinary exclusion might also apply to disciplinary in-school suspensions. A final unaddressed issue is one concerning what, if any, effect would result from a change in the P.L. 94-142 or Section 504 statutes or regulations. Given the current political climate, such changes are a possibility. Were they to occur, the basis for some of the legal precedents could be undermined.

Due to the limitless scope of situations potentially placing handicapped children in disciplinary situations, it is difficult to predict what other unresolved issues will surface. It would appear, however, that many of the foundational judicial interpretations of federal policy in the area of disciplinary exclusion of handicapped children have been established, requiring only further elaboration and detail, rather than entirely new thrusts.

References

Grosenick, J. and Huntze, S. National Needs Analysis in Behavior Disorders: Adolescent Behavior Disorders. Columbia, MO: Department of Special Education, University of Missouri, 1980.

Groserick, J. and Huntze S. National Needs Analysis in Behavior Disorders: Severe Behavior Disorders. Columbia, MO: Department of Special Education, University of Missouri, 1980.

Grosenick, J., Huntze, S., Kochan, B., Peterson, R., Robertshaw, C. and Wood, F. National Needs Analysis in Behavior Disorders, Working Paper: Disciplinary Exclusion. Columbia, MO: Department of Special Education, University of Missouri, 1981.

Grosenick, J., Huntze, S., Kochan, B. Peterson, R., Robertshaw, C. S., and Wood, F. Working Paper: Legislation, Litigation and the Handicapped. Columbia, MO: Department of Special Education, University of Missouri, 1981.

National Center for Law and Education, Inc. Excerpt from Letter of Comment on Notice of Intent to Develop Regulations, Interpretative Rules or Policy Statements. Cambridge, MA, 1980.

Regal, J., Elliott, R., Grossman, H., and Morse, W. The Exclusion of Children from School. Reston, VA: Council for Children with Behavior Disorders, 1972.

The 13th Annual Gallup Poll of the Public's Attitude Toward the Public Schools, Phi Delta Kappan, 1981, 63, 33-47.

APPENDIX

ANNOTATED COURT CASES

JOHN BLUE,
v.
New Haven Board of Education, et al.,

No. N 81-41

United States District Court, Connecticut

March 23, 1981

Ellen Bree Burns, District Judge

Motion for preliminary injunction to restrain board of education from conducting any expulsion hearing or taking any other steps to expel student from school, and to direct his reinstatement into special education program or some other suitable program pending a final determination on the merits. Following suspension of child because, inter alia, of altercation with teacher, principal recommended that school board expel child. Planning and placement team recommended homebound instruction until expulsion hearing was conducted and continuation of homebound instruction or placement at Trowbridge School if child was expelled. Parent obtained temporary restraining order preventing child's expulsion pending hearing on motion for preliminary injunction.

HELD, plaintiff has made a persuasive showing of irreparable harm and likelihood of success on the merits and is entitled to preliminary injunction. Any attempt by LEA to expel child from school or otherwise change his educational placement during the pendency of his special education complaint would violate 20 U.S.C. §1415(e)(3). Since the child has already been excluded for more than 10 consecutive days and, under Connecticut law, such an exclusion is tantamount to an expulsion, child is being denied right to remain in his present education placement during the pendency of his special education complaint. Child is entitled to have his educational placement changed by the PPT, and not through the school's normal disciplinary procedures, and to have any PPT placement decision reviewed pursuant to the procedures contained in 20 U.S.C. §1415 (b)-(e). Moreover, homebound instruction pending expulsion and, following expulsion, either continuing that instruction or placement at Trowbridge deprive child of his right to an education in the least restrictive environment.

JANE DOE, on behalf of her minor son,
DENNIS DOE, Individually and on behalf
of all other persons similarly situated, Plaintiffs
v.
KENNETH J. KOGER, Individually and in his capacity
as Superintendent of the School, City of
Mishawaka; JOHN SHOTTS, Individually and as
Director of Special Education for the School,
City of Mishawaka; RONALD KRONEWITTER,
GEORGE VERNASCO, ELVIRA TRIMBOLI, SAMUEL
MERCANTINI and ROSEMARY SPALDING, Individually
and in their official capacity as Members of the
Board of School Trustees of the School, City of
Mishawaka; HAROLD H. NEGLEY, in his official
capacity as Indiana Superintendent of Public
Instruction; and GIBLERT BLITON, in his official
capacity as Director of Special Education for
the State Department of Public Instruction, Defendents.

Civ. A. No. S 79-14

United States District Court
N.D. Indiana
South Bend Division

November 21, 1979

Supplementary Entry December 3, 1979

Allen Sharp, District Judge

Counsel for Plaintiffs: Kyle M. Payne, Legal Services Program for Northern Indiana, Inc., South Bend, Indiana

Counsel for Defendants: Theodore L. Sendak, Attorney General of Indiana, Ronald J. Semler, Deputy Attorney General, Indianapolis, Indiana, James J. Olson, Mishawaka, Indiana

Action by "mildly mentally handicapped" student and his mother alleging that expulsion from school violated student's rights under Education of the Handicapped Act, 20 U.S.C. §§1401 et seq., EHA regulations, and Equal Protection Clause of 14th Amendment. Student was suspended with recommendation for expulsion and was expelled for remainder of school year following expulsion hearing. Student's attorney indicated that expulsion would be appealed and requested Rule S-1 hearing. Rule S-1 is State regulation establishing, among other things, specific procedures to be used in placement of mildly mentally handicapped students and other students needing special education. Shortly thereafter, parties agreed that, pending further legal action, student would be placed in interim educational program, which he was. This action followed.

HELD, students whose handicaps caused them to be disruptive cannot be expelled or indefinitely suspended; the school is allowed only to transfer the student to an appropriate, more restrictive environment. Whether a child's handicap is the cause of the child's propensity to disrupt must be determined through the change of placement procedures required by EHA. To subject handicapped students to the same disciplinary expulsions as other students is not to invidiously discriminate against the handicapped in violation of the Equal Protection Clause of the 14th Amendment.

HOWARD S. et al., Plaintiffs
v.
FRIENDSWOOD INDEPENDENT SCHOOL DISTRICT et al., Defendents.

Civ. A. No G-78-92

United States District Court
S.D. Texas
Galveston Division

June 23, 1978

Parents of handicapped minor sought injunctive relief to insure that minor received necessary and appropriate treatment and education. On motion for preliminary injunction, the District Court, Cowan, J., held that school district violated its legal obligations under the Rehabilitation Act of 1976 and under the 5th and 14th Amendments with respect to high school student who had minimal brain damage and emotional problems and failed to provide constitutionally required hearings with respect to student's constructive expulsion mandating issuance of preliminary injunction requiring school district to pay cost of student's private schooling necessitated by his difficulties.

Order accordingly.

1. Schools and School Districts - 148
Regulations issued by the Secretary of Health, Education, and Welfare under the Rehabilitation Act of 1973, the Education for All Handicapped Children Act of 1975, and the amendments of 1974 are reasonably related to the purposes of the enabling legislation. Rehabilitation Act of 1973, §504, 29 U.S.C.A. §794; Education of the Handicapped Act, §602 as amended 20 U.S.C.A. §1401.

2. Civil Rights - 13.4(1)
Schools and School Districts - 115
The Civil Rights Act and the Rehabilitation Act of 1973 afford a private cause of action to handicapped students who are denied necessary and appropriate treatment and education. 42 U.S.C.A. §1982; Rehabilitation Act of 1973, §504, 29 U.S.C.A. §794.

3. Injunction - 147
For purposes of preliminary injunction, evidence established that school district violated its legal obligations under the Rehabilitation Act of 1973 and under the 5th and 14th Amendments with respect to high school student who had minimal brain damage and emotional problems and failed to provide constitutionally required hearings with respect to student's constructive expulsion, mandating issuance of preliminary injunction requiring a school district to pay cost of student's private schooling necessitated by his difficulties. Rehabilitation Act of 1973, §504, 29. U.S.C.A. §794; U.S.C.A. Const. Amends. 5, 14.

MATTIE T., et al., Plaintiffs
v.
CHARLES E. HOLLADAY, et al., Defendents

Civil Action
No. DC-7-31-s

Northern District of Mississippi
Delta Division
ORMA R. SMITH, District Judge

January 26, 1979

Class action was on behalf of all school children in the State of Mississippi who are handicapped or regarded by their schools as handicapped. Plaintiffs asserted that the special education policies and practices of the state and local defendant officials violated their rights under the Education of the Handicapped Act, Section 504 of the Rehabilitation Act of 1973, as amended, Title I of the Elementary and Secondary Education Act of 1965, and the equal protection and due process clauses of the 14th Amendment to the United States Constitution. Summary judgment was granted for the plaintiffs, the court declaring, inter alia, that the defendants had violated the plaintiffs' rights under EHA to 1) procedural safeguards; 2) racially and culturally non-discriminatory tests and procedures used to classify them as handicapped and place them in special education programs; 3) educational placement in the least restrictive environment; and 4) a program to locate and identify all handicapped children in the state in need of special education services. Consent agreement developed pursuant to court's order specifies the policies, monitoring procedures and enforcement mechanisms to be implemented by the state defendents to remedy the violations found by the court.

MRS. A. J., on behalf of herself and her daughter, K.J., Plaintiff
v.
SPECIAL SCHOOL DISTRICT NO. 1, Defendant

Civ. No. 4-77-192

United States District Court
D. Minnesota, Fourth Division

October 12, 1979

MacLaughlin, District Judge

Counsel for Plaintiff: William F. Messinger, Minneapolis, MN; James E. Wilkinson, III, Coalition for the Protection of Youth Rights, Central Minnesota Legal Services, Minneapolis, MN.

Counsel for Defendant: Frederick E. Finch, Fredrikson, Byron, Colborn, Bisbee & Hansen, P.A., Minneapolis, MN

Action brought pursuant to 42 U.S.C. §1983 to challenge the lawfulness of procedures utilized by a school district (LEA) in the 15 day suspension of a child for disciplinary reasons. The plaintiffs, a mother and her daughter, alleged that the LEA did not comply with the State's "Pupil Fair Dismissal Act," Minn. St. §§127.26 - 127-39, or with Federal and State statutes concerning handicapped students. At the time of her suspension, the student was the subject of an ongoing "formal educational assessment," as defined in State statutes and regulations, but was not being treated as a special education student or handicapped child by the LEA; not had the ongoing assessment process yet culminated in any identification of the student as a handicapped child or any proposed course of action as to her future educational placement. Plaintiff sought declaratory and other equitable relief, as well as attorneys' fees pursuant to 42 U.S.C. §1988.

HELD, plaintiff is entitled to a declaratory judgment that the 15 day suspension was unlawful under State law and to have expunged from her school records any reference to the suspension. This relief is appropriate even if the grounds for her suspension were appropriate, and even if she would have been suspended in any event, because the procedures utilized by the LEA were deficient under the State's "Pupil Fair Dismissal Act."

School officials had no obligation to treat the student as handicapped or special education student when the suspension was imposed, and, therefore, it was unnecessary to provide additional hearing procedures or a formal hearing. State and Federal [§1415(b)(1)(C)] hearing procedures are clearly designed to minimize the risk of misclassification and to provide input of the parent and child in the identification or classification decision; thus, schools are under a clear obligation to make the classification decisions through an exclusive formal process. For defendents to have treated the student as handicapped on the basis of an assumption, as plaintiff contended, would have required defendants to ignore and even violate Federal and State law concerning classification or identification.

P-1 v. SHEDD

P-1 by and through his mother and next friend, M-1;
P-2 by and through his mother and next friend, M-2;
P-3 by and through his father and next friend, M-3;
P-4 by and through his mother and next friend, M-4;
P-5 by and through his mother and next friend, M-5;
P-6; P-7 by and through his mother and next friend, M-7;
P-8 by and through his mother and next friend, M-8;
P-9 by and through his mother and next friend, M-9;
P-10 by and through his mother and next friend, M-10;
P-11 by and through his mother and next friend, M-11.
Plaintiffs

v.

MARK SHEDD, individually and as Commissioner, State Department of Education, FRANCIS MALONEY, individually and as Commissioner, Department of Children and Youth Services, Defendants.

BARBARA BRADEN, individually and in her capacity as Acting Superintendent, Hartford Public Schools, KATE CAMPBELL, FREDERICK BASHOUR, ROBERT BUCKLEY, CURTISS CLEMMENS, JIMMIE BROWN, MARIA SANCHEZ, BARBARA KENNY, M. SUSAN GINSBERG. MYLES HUBBARD, individually and in their official capacities as members of the Hartford Board of Education,
Defendants and Third Party Plaintiffs

v.

THE CITY OF HARTFORD, JOHN A. SULIK, City Manager of the City of Hartford, JOHN P. WALSH, Director of Finance of the City of Hartford, GEORGE ATHANSON, Mayor of Hartford, NICHOLAS R. CARBONE, OLGA W. THOMPSON, WILLIAM D'BELLA, RICHARD SUISMAN, MARGARET TEDONE, SYDNEY GARDNER, MILDRED TORRES, ROBERT LUDGIN, AND RAYMOND MOTEIRO, members of the Court of Common Council fo the City of Hartford,
Third Part Defendants

No. 78-58

D. Connecticut
March 23, 1979
T. EMMET CLARIE, Chief Judge

Action on behalf of six children in the Hartford, CT, School System claimed that State Commissioner of Education, Superintendent, and members of Hartford Board of Education denied plaintiffs their right to a free and appropriate program of special education in violation of the Education for All Handicapped Children Act, Pub. L. 94-142, and the due process and equal protection clauses of the U.S. Constitution by denying, in some instances, certain procedural protections, failing to provide proper individualized education programs, and delaying placement in appropriate programs for up to two years.

Although number of plaintiffs was increased to 11, class certification was denied; additional defendants, i.e., Mayor, City Manager, Director of Finance and Members of Hartford City Council, and Commission of State Department of Children and Youth Services, were added.

Following pre-trial motions, including denial of defendants' motion to dismiss, and certain changes in the Hartford special education system - addition of new staff for special education, development of certain standard forms; initiation of programs of inservice training of special education personnel, and reforms in identification, evaluation and programming, the parties agreed to the entry of a consent decree, the terms of which satisfy the specific educational needs of the named plaintiffs. Moreover, under the decree, the policies, practices and procedures are to serve to benefit other handicapped children in the Hartford School System, and are to be fully implemented by September 1, 1979. The decree is ordered on the agreement that nothing stated therein shall constitute an admission by the defendant of any unlawful practices, nor an admission by the plaintiffs that the decree fully satisfies defendants' obligations under Pub. L. 94-142, the Rehabilitation Act of 1973, §504, the due process and equal protection clauses of the U. S. Constitution, or the Connecticut General Statutes.

The provisions of the consent decree concerning specific subject areas will be found at the page indicated under the following index:

	Introduction	551:165
I.	Programming and Placement of Named Plaintiffs	551:166
II.	Court Expert	551:168
III.	Free and Appropriate Education	551:169
IV.	Least Restrictive Alternative	551:170
V.	Procedural Protections	551:171
VI.	Individualized Education Programs	551:171
VII.	Timelines for Placement	551:173
VIII.	Discipline	551:173
IX.	Identification of First Priority Children	551:174
X.	State Department of Education Responsibility	551:175
XI.	Standard Forms	551:176
XII.	Dispute Resolution	551:176

JEAN SHERRY, Individually and as next friend of her infant child, DELOWEEN SHERRY, Plaintiff
v.
NEW YORK STATE EDUCATION DEPARTMENT, New York State School for the Blind, and the Olean City School District
Defendents

No. Civ-79-17

United Stated District Court
W.D. New York

November 5, 1979

CURTIN, Chief Judge

Counsel for Plaintiff: Monroe County Legal Assistance Corp., Southern Tier Legal Services (Michael L. Hanley, Olean, NY of counsel)

Counsel for State Defendants: Robert D. Stone, Albany, NY, New York State Education Department (Seth Rockmuller, Buffalo, NY of counsel)

Counsel for Defendant Olean City School District: Shane & Franz, Olean, NY (J. Michael Shane, Olean, NY of counsel)

Action for injunctive and declaratory relief concerning suspension of handicapped child from State school for the blind, allegedly in violation of Education of the Handicapped Act, 20 U.S.C. §§1401 et seq., and §504 of the Rehabilitation Act of 1973. The multiply-handicapped child was removed from the New York State School for the Blind and hospitalized for treatment of self-inflicted injuries. Three weeks later, the Superintendent of the School, which was run directly by the State, informed the child's mother that the school had insufficient staff to supervise the child and that a return to the residential program would be impossible until her condition changed or more staff was hired. Shortly thereafter, following a multidisciplinary meeting at the local district high school, the Superintendent told the mother that if she insisted on returning the child, the school would suspend her and, if she requested it, provide a suspension hearing. The local school district concluded it had no appropriate program for the child and discontinued day program assistance; the mother requested an impartial due process hearing, pursuant to EHA §1415, from the State school. Within a week, the school suspended the child, informing the mother that the suspension would be revoked whenever "it appears to be in (the child's) and the school's best interests to do so" and that a hearing would be provided, at which the mother and child had a right to representation by counsel.

HELD, allegation that SEA has not provided the impartial hearing required by §1415(e)(2) a fortiori, asserts a claim over which the court has jurisdiction under §1415. Although existence of meaningful administrative enforcement mechanism might preclude judicial review of private claim under §504, since such a mechanism is lacking,

neither the doctrines of exhaustion of administrative remedies or primary jurisdiction applies. While plaintiff has been reinstated in residential program, claim is not moot because the review procedures complained of are still those utilized; moreover,, given plaintiff's condition, there is a significant likelihood that problem could repeat itself and the right to review, if any, would again become an issue.

Although during child's hospitalization and perhaps for a short period of time thereafter, it can reasonably be argued that no change of placement occurred and, therefore, no agency hearing or other safeguards under EHA were required, when, approximately one month later, child was no longer in residential program and temporary program of day assistance had terminated, change in the child's educational placement had occurred within the meaning of §1415.

State regulations governing "due process hearing" for residents of State operated facility that do not employ an impartial hearing officer or provide for maintenance of placement pending resolution of a complaint are not in compliance with §1415.

A defense of lack of staff cannot justify a default by State educational agency in the provision of an appropriate education to a qualified handicapped child.

CHRISTIAN STANLEY, by and through his mother and next friend,
LINDA STANLEY, Plaintiff
v.
School Administrative Unit No. 40 for Milford - Mont Vernon,
New Hampshire, et al., Defendants

No. 80-9-D

United States District Court for the District of New Hampshire

January 15, 1980

O'Connell, District Judge

On motion for declaratory and injunctive relief to prevent LEA from suspending learning disabled, but not emotionally disturbed, child. During first year in high school, child was referred to regional special education consortium, but during that year was suspended six times - once for use of profanity, the balance for failure to come to detention. Prior to the last of these suspensions, the child's parent was notified that the school board would hold a hearing and that parent had a right to have counsel present. The school board suspended the child for 21 days "for neglect or refusal to conform to the reasonable (rules) of" the high school and directed that the child be re-evaluated as soon as practicably possible.

HELD, motion for preliminary injunction denied in most respects. Child is unlikely to succeed in his claim that the suspension constitutes a discrimination on the basis of his handicap. Evidence indicates that child's disruptive behavior was not caused to any substantial degree by his handicap or by his current placement program, but rather by serious family problems. Moreover, although the suspension involved is longer than that considered in GOSS v. LOPEZ, 419 U.S. 565(1975), more elaborate procedural safeguards than are required by GOSS were afforded and it is unlikely that they will be found procedurally defective. Finally, since the suspension cannot be said to be discriminatory because the child's behavior has not been shown to be substantially related to the child's handicap or the LEA's attempts to remedy that handicap, the unequal treatment that is the hallmark of equal protection analysis under any standard is here not sufficiently evident to predict success on the merits of this claim.

KATHY STUART, by and through her mother and next friend, JOAN STUART, Plaintiffs

v.

PASQUALE NAPPI, Individually and in his capacity as Superintendent, Danbury Public Schools, Carl Susnitsky, Henrique Antonio, Paul Werner, Paul Baird, Theresa Boccuzzi, Bunny Jacobson, Tonio Pepe, Barbara Baker, Henry Bessel, Robert Jones, Individually and in their capacities as Members of the Danbury Board of Education, Defendents.

Civ. No. B-77-381

United States District Court
D. Connecticut

January 4, 1978

Proceeding was instituted on motion of plaintiff to obtain preliminary relief against...disclosure. The Contract Compliance Officer will inform the contractor of such a determination. The contractor may appeal that ruling to the Director of OFCC within 10 days. The Director of OFCC shall make a final determination within 10 days of the filing of the appeal...her expulsion from high school by defendants. The District Court, Daly, J., held that preliminary injunction would issue to enjoin defendants from conducting a hearing to expel plaintiff from high school and to require defendants to conduct an immediate review of plaintiff's special education program where plaintiff made a persuasive showing of possible irreparable injury in that she had deficient academic skills caused by a complex of learning disabilities and limited intelligence and, if expelled, would be without any educational program from date of expulsion until such time as another review was held and an appropriate educational program developed, and plaintiff demonstrated probable success on merits of federal claims that she was denied her rights under the Education of the Handicapped Act to appropriate public education, to remain in her present placement until resolution of her special education complaint, to an education in the least restrictive environment, and to have all changes of placement effectuated in accordance with prescribed procedures.

Preliminary relief ordered.

1. Injunction - 136(3), 137(4)

A plaintiff wishing to obtain a preliminary injunction or possible irreparable injury or sufficiently serious questions going to the merits of the claim and a balance of hardships tipping decidedly in his favor.

2. Injunction - 136(3), 137(4)

Preliminary injunction would issue to enjoin defendants from conducting a hearing to expel plaintiff from high school and to

require defendants to conduct an immediate review of plaintiff's special education program where plaintiff made a persuasive showing of possible irreparable injury in that she had deficient academic skills caused by a complex of learning disabilities and limited intelligence and, if expelled, would be without any educational program from date of expulsion until such time as another review was held and an appropriate educational program developed, and plaintiff demonstrated probable success on merits of federal claims that she was denied her rights under the Education of the Handicapped Act to appropriate public education, to remain in her present placement until resolution of her special education complaint, to an education in the least restrictive environment, and to have all changes of placement effectuated in accordance with prescribed procedures. Education of the Handicapped Act, §§602 (1), (15-19), 612(5)(B), 615(b)(1)(C, E), (c), (e)(3, 4) as amended 20 U.S.C.A. §§1401(1), (15 19), 1412(5)(B), 1415(b)(1)(C, E), (c), (e)(3, 4).

3. Federal Court - 14

Claim that act of defendants in expelling plaintiff from high school was in contravention of Connecticut statutes was based on argument that plaintiff was entitled to a current psychological evaluation and a determination of the adequacy of her special education placement prior to an expulsion hearing and, as such, was exclusively a state claim that was to be ruled upon by a state court in first instance before a district court could exercise its pendent jurisdiction over same. C.G.S.A. §§4-177, 4-177(c), 10-233d.

4. Schools and School Districts - 169, 177

Provision of the Education of the Handicapped Act that during pendency of any proceedings child shall remain in current educational placement, unless state or local educational agency and parents or guardian otherwise agree, operates to prohibit disciplinary measures which have effect of changing a child's placement and so prohibits expulsion of handicapped children during pendency of a special education complaint. Education of the Handicapped Act, §615(b)(1)(E), (e)(3) as amended 20 U.S.C.A. §1415(b)(1)(E), (e)(3).

5. Schools and School Districts - 177

Use of expulsion proceedings as a means of changing a placement of a disruptive handicapped child contravenes provisions of the Education of the Handicapped Act governing procedure whereby disruptive children may be transferred to more restrictive placements when their behavior significantly impairs education of other children. Education of the Handicapped Act, §§612(5)(B), 615(b)(1)(C), (c) as amended 20 U.S.C.A. §§1412(5)(B), 1415(b)(1)(C), (c).

6. Schools and School Districts - 169, 177

Handicapped children are neither immune from a school's disciplinary process nor are they entitled to participate in programs

when their behavior impairs education of other children in program; school authorities can take swift disciplinary measures, such as suspension, against disruptive handicapped children and can request a change in placement of handicapped children who have demonstrated that their present placement is inappropriate by disrupting education of other children. Education of the Handicapped Act, §§612(5)(B), 615(b)(1)(C), (c) as amended 20 U.S.C.A. §§1412(5)(B), 1415 (b)(1)(C), (c).

7. Schools and School Districts - 169

Although there is little doubt that judgment of state and local school authorities is entitled to considerable deference, it is equally clear that even a school's disciplinary procedures are subject to scrutiny of federal judiciary in such instances as non-compliance with procedural safeguards of the Education of the Handicapped Act, §615(e)(4) as amended 20 U.S.C.A. §1415(e)(4).

8. Federal Courts - 332

Provisions of the Education of the Handicapped Act vests jurisdiction in federal district courts over all claims of noncompliance with procedural safeguards of the Act regardless of the amount in controversy. Education of the Handicapped Act, §615(c)(4) as amended 20 U.S.C.A. §1415(e)(4).

S-1, a minor, by and through his mother and next friend, P-1 et al., Plaintiffs-Appellees

v.

RALPH D. TURLINGTON, individually, and in his official capacity as Commissioner of Education, State of Florida, Department of Education et al., Defendants-Appellants

No. 79-2742

United States Court of Appeals, Fifth Circuit, Unit B

January 26, 1981

Appeals from the United States District Court for the Southern District of Florida

Before Vance, Hatchett and Anderson, Circuit Judges

Hatchett, Circuit Judge

Appeal from entry of preliminary injunction by District Court for the Southern District of Florida, 3 EHLR 551-211 [1979-80 DEC.], compelling State and local officials to provide educational services and procedural rights provided by EHA to students expelled for misconduct.

HELD, since trial court did not abuse its discretion in entering the preliminary injunction, its decision is affirmed. Before a handicapped student can be expelled, a trained and knowledgeable group of persons must determine whether the student's misconduct bears a relationship to his handicapping condition. An expulsion is a change in educational placement which invokes the procedural protections of EHA and §504. Expulsion is a proper disciplinary tool under EHA and §504, but a complete cessation of educational services is not. EHA, 20 U.S.C. §1415(b), requirement that parents have an opportunity for due process hearing makes no exception for handicapped students who voluntarily withdraw from school or previously agree to an educational placement. State officials were properly included within scope of injunction since, under EHA, 20 U.S.C. §1412(6). SEA is responsible for ensuring implementation of EHA and expulsion proceedings may deny benefits of EHA to children entitled to education under Act.